

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *


IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	CORRECTION
NO. 33484-g40A BY MERLE E. HUNT)	OF FINAL ORDER

* * * * *

Due to typographical error, the point of diversion was
incorrectly described in the Final Order.

The correct point of diversion is the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section
23, Township 8 North, Range 25 East, Musselshell County, Montana.

DONE this 3rd day of October, 1984.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

CASE # 33484

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 4, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by Merle E. Hunt, Application No. 33484-g40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Merle E. Hunt, Box 5027, Roundup, MT 59072
2. Loren P. Peck, Box 206, Roundup, MT 59072
3. Arthur Orley, Jr., D.V.M., P.O. Box 67, Roundup, MT 59072
4. Steve and Catherine Racki, Klein Star Rt., Box 5005, Roundup, MT 59072
5. Daryld and Trixie Kautzmann, P.O. Box 883, Roundup, MT 59072
6. Frances Bajt, P.O. Box 573, Roundup, MT 59072
7. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
8. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 4th day of October, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

CASE # 33484

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 33484-g40A BY MERLE E. HUNT)	

* * * * *

The time period for filing exceptions or objections to the Proposal for Decision, March 19, 1984, having expired, and no exceptions or other argument having been recieved, the Department of Natural Resources and Conservation accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision and incorporates them herein by reference.

WHEREFORE, the following Final Order in the above-entitled matter is hereby entered.

ORDER

Subject to the terms, conditions, restrictions, and limitations below, Application No. 33484-g40A is hereby granted to Merle E. Hunt to appropriate up to 300 gallons per minute up to 131.5 acre-feet per year between May 1 and September 30 of each year, for sprinkler irrigation of approximately 35 acres in the NE $\frac{1}{4}$ Section 22, Township 8 North, Range 25 East, Musselshell County, Montana. The appropriation is to be by means of a well located in NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 23, Township 8 North, Range 25 East, Musselshell County, Montana. The source of supply is subsurface

CASE # 33484

water stored in the abandoned underground mine workings of the Roundup Coal Mine Number 3, Room 5. The priority date for this permit shall be March 19, 1981 at 12:00 p.m.(noon).

This permit is issued subject to the following express terms, conditions, restrictions and limitations, necessary to protect the rights of other appropriators.

A. This permit is subject to all prior existing water rights in the source of supply. Further: this permit is subject to any final determination of existing water rights, as provided by Montana Law.

B. The Permittee shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of that quantity reasonably required for the purposes provided for herein.

C. The Permittee shall proceed with reasonable diligence in the construction of their well and appropriative works, and in actually applying the waters provided for herein to beneficial use.

D. Permittee shall diligently adhere to the terms, conditions, restrictions, and limitations of this Order.

E. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

F. If at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the

CASE # 33484


Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the applicant to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.


G. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 3rd day of May, 1984.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605


Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

CASE # 33484

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 4, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Merle E. Hunt, Application No. 33484-g40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Merle E. Hunt, Box 5027, Roundup, MT 59072
2. Loren P. Peck, Box 206, Roundup, MT 59072
3. Arthur Orley, Jr., D.V.M., P.O. Box 67, Roundup, MT 59072
4. Steve and Catherine Racki, Klein Star Rt., Box 5005, Roundup, MT 59072
5. Darryld and Trixie Kautzmann, P.O. Box 883, Roundup, MT 59072
6. Frances Bajt, P.O. Box 573, Roundup, MT 59072
7. Sam Rodriguez;, Lewistown Field Office (inter-departmental mail)
8. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 4th day of May, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Bette Lambson
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 6 Oct 1985

CASE # 33484

WAC

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 33484-g40A BY MERLE E. HUNT)	

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, Part 3, (1983) and to the contested case provisions of the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, the above-entitled matter came on for hearing on November 1, 1983, in Roundup, Montana.

The Applicant, Merle E. Hunt, appeared pro se, along with his witness, John McDermott.

Objectors Loren Rech, and Orbey Arthur, Jr., although filing timely objections, failed to appear at the hearing, either personally or by representative .

Steve and Catherine Racki appeared pro se , through Steve Racki.

Darryld and Trixie Kautzmann appeared pro se, through Darryld Kautzmann.

Frances Bajt appeared pro se.

Paul Lemire, Hydrogeologist for the hydro-science section of the Water Resources Divison, appeared as a Department of Natural Resources and Conservation (hereafter, "Department", or "DNRC")

staff expert witness, and Sam Rodriguez, Area Office Supervisor, and Sterling Sundheim, of the Lewistown Water Rights Field Office, appeared as Departmental Staff expert witnesses.

STATEMENT OF CASE

The Applicant seeks to appropriate water by means of a well approximately 175 feet deep located on the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 23, Township 8 North, Range 25 East, Musselshell County, Montana. He seeks to appropriate up to 300 gallons per minute (hereafter, "gpm") up to 131.5 acre-feet (hereafter, "ac-ft") per year, for new irrigation of lagoon grasses, i.e.: pasture hay, between May 1 and September 30, inclusive, of each year, on approximately 35 acres located in the NE $\frac{1}{4}$ Section 22, Township 8 North, Range 25 East, Musselshell County, Montana. The source of supply is water collecting within abandoned workings of the Roundup Coal Mine, specifically, the pump will tap into Room 5.

Pertinent sections of the application were published for three consecutive weeks in the Roundup-Record Tribune.

Loren Rech filed a timely objection, alleging generally that the proposed project would draw water from the gravel and sands of the Musselshell River, and work adverse affect to Mr. Rech's water right to water from Deadman's Basin and flowing in the Musselshell.

Orley Arthur, Jr. D.V.M., also filed a timely objection generally alleging that the proposed project would adversely affect his well, which supplies water for his domestic use, as well as the uses of his Veterinary Clinic.

Steve and Catherine Racki timely filed an objection generally alleging that the proposed project would deplete the groundwaters upon which they rely for their domestic uses, and that there are not unappropriated waters in the source of supply to accommodate an irrigation use, the predominant use in the area being residential.

Darryld and Trixie Kautzmann timely filed an objection generally alleging that there is no unappropriated water available for the Applicant's proposed use, because of the recent residential development in the area, and that their domestic water supply, supplied by well, will be adversely affected.

Frances Bajt timely filed an objection stating generally that his water supply, furnished by means of a well, will be adversely affected by Applicant's proposed use.

EXHIBITS

The Applicant offered the following exhibits into evidence:

Ap. 1 - A schematic diagram depicting a cross-section of the Musselshell River and land riparian thereto. John McDermott prepared the drawing.

Ap. 2 - A chart, also prepared by John McDermott, showing the chemical composition of water samples drawn from an alluvial well in Section 24, Township 8 North, Range 25 East, Musselshell County, Montana, and the chemical composition of water taken from Mr. Hunt's proposed well.

Ap. 3 - A photocopy of a technical drawing of the underground workings of the Roundup No. 3 mine.

Ap. 4 - A Soils Inventory for Merle Hunt Irrigation Project,
by John Rougne, Jr.

All of the Applicant's exhibits were received into the
record.

Mr. Kautzmann offered the following exhibits into the record:

Obj. A - A photocopy of figure 3, from the geohydrologist's
report, Department's Exhibit 1.

Obj. B - A photocopy of figure 1, from Department's Exhibit
1.

Obj. C - A photocopy of figures 4a and 4b from Department's
Exhibit 1.

Obj. D - A photocopy of figures 4a and 4b from Department's
Exhibit 1. With "corrected" land surface elevation and well
depth drawn in by Mr. Kautzmann.

All of Mr. Kautzmann's exhibits were received into the
record.

The Department offered the following exhibits into the
record:

Dept. 1 - Memorandum of October 27, 1982, from Debra
Hanneman, geohydrologist, to Wayne Wetzel regarding the Merle
Hunt Application No. 33484-g40A.

Dept. 2 - Musselshell River Basin Conditions, prepared by
Department personnel in the Lewistown Water Rights Field Office.

Dept. 3 - Water Availability Analysis on the Musselshell
River below Ryegate, Montana, by Sterling Sundheim, Engineer,
Water Rights Bureau, Water Resources Division, Department of
Natural Resources and Conservation, January 1982.

All of the Department's exhibits were received into the record.

At Mr. Kautzmann's request, the Hearing Examiner made a site-visit on November 15, 1983. Present were Mr. Hunt, Mr. Kautzmann, Mr. Lemire, and the Hearing Examiner. The party visited the Applicant's proposed pumping site and environs, as well as Mr. Kautzmann's well. As a result of the visit, Mr. Lemire prepared a supplemental geohydrology report, which was mailed to all parties, and entered into the record herein.

The Hearing Examiner, having reviewed the evidence submitted herein, and now being fully advised in the premises, does hereby make the following Proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.

2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

3. The Applicant intends to use water for irrigation: a beneficial use.

4. The Applicant intends to pump up to 300 gpm, up to 131.5 ac-ft per year between May 1 and September 30, for sprinkler irrigation of approximately 35 acres in the NE $\frac{1}{4}$ Section 22, Township 8 North, Range 25 East, Musselshell County, Montana.

5. The amount the Applicant proposes to apply is reasonable, given the limited water retention available in the soils (fine, sandy loams) dominant in the acreage to be irrigated. Frequent irrigation during the growing season will be necessary.

6. The water would be pumped by means of an electric 10 horsepower submersible pump, from Room No. 5, Roundup Number 3 Coal Mine, at an approximate depth of 175 feet, at NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 23, Township 8 North, Range 25 East, Musselshell Count, Montana.

7. The Roundup Coal Mine is an abandoned underground coal mine, consisting of at least 10 acres of excavated mine workings.

8. During the mine's operation, large quantities of water were pumped out of the workings to dewater the rooms and allow continued mining. The frequency of pumping and the volume pumped are disputed: there was a sufficient volume and frequency of water being pumped from the mine that at least two local residents were able to appropriate it and put it to beneficial use for garden irrigation. Testimony of John McDermott alleged that tens of millions of gallons were pumped out of the mine each year: the pumping rate may be been as high as 1400 gpm and that pumping frequency may have been practically constant. Dept. Ex. 1 also refers to the 1400 gpm rate of pumping. Testimony of Mr. Racki indicated that pumping may have been concentrated in the eastern portions of the mine and may have been limited to 3 to 3 $\frac{1}{2}$ hours per day.

9. The mine workings, covering a minimum of 10 acres and having a height of approximately 8 feet, would constitute a storage area of 80 acres.

10. A test well drilled at the site indicates the distance from land surface to the top of Room 5 is 157 feet.

11. The test well indicated that Room 5 is, for all practical purposes, filled with water.

12. The amount of water stored in the underground mine workings could be as high as 80 ac-ft.

13. The alluvium surrounding the Musselshell, and adjacent to, sometimes above, the coal mine, is approximately 20 feet thick, with a probable porosity of 10%. In each acre of alluvium, there would be 2 feet of water stored.

14. Subsurface water movement is induced by hydrostatic pressure, that is, will vary seasonally, and will change direction depending on the gradient, or difference in hydrostatic pressure between two points. During high spring run-off, water will seep from the Musselshell River into the surrounding alluvium, recharging the groundwater source therein. During late summer, or fall, depending upon that year's rainfall and amount of irrigation and other types of water usage, the gradient changes, and the water stored in the alluvium will rise to add to the volume of water flowing in the Musselshell.

15. Recharge to the alluvium, and indirectly to the underground mine workings, comes primarily from precipitation, snowmelt, and the Musselshell River.

16. The Roundup Coal Mine is in the Tongue River member, which is the upper part of the Fort Union Formation.

17. Water pumped from Mr. Hunt's well would draw first from

the water stored within the Roundup Coal Mine. If that were depleted, then the resultant induced gradient would cause water to be drawn from the alluvium first, and eventually, from the Musselshell River.

18. Water seeps at an undetermined rate from the River into the coal mine. (testimony of John McDermott, & Dept. Ex. 1.)

19. The Applicant's probable amount of pumping would, more likely than not, deplete the volume of water currently stored in the coal mine workings. Some induced gradient would cause increased movement of water from the alluvium into the mine, probably near the end of the irrigation season.

20. Water sample analyses indicate the recharge to the mine directly from the Musselshell is minimal.

21. The Kautzmann and Arthur wells are developed in the Tongue River member of the Fort Union Formation. Because of the synclinal structure of the region's geologic strata, those wells more likely than not are tapping aquifers stratigraphically below the Roundup coal bed.

22. The Arthur and Kautzmann wells, being further from the synclinal axis than the Applicant's proposed well site, will be recharged before the coal mine; i.e., the water recharging these objectors' wells will flow first to those wells. Even if the two separate aquifers from which these objectors pump and from which the Applicant would pump are interconnected, no adverse affect to these objectors is expected.

23. The Racki and Bajt wells are also tapping the Tongue River Member of the Fort Union Formation. The available

information indicates that these wells are all tapping a stratigraphically deeper aquifer than the Roundup Coal Mine. The Racki well log indicates a shale seam which would separate the coal bed from the source of his well.

24. The Racki and Bajt wells are recharged from the alluvium, as is the Roundup coal Mine. Because of their distance from the Applicant's proposed well, however, no adverse affect to these Objectors is expected.

25. The Rech objection is based upon possible depletion to the flow in the Musselshell. On the basis of the record herein, it is impossible to quantify the impact which may occur to the River. It is more likely than not any impact will be minimal, and, impossible to trace. That is, whatever increase in induced leakage would result from Applicant's pumping will be impossible to trace and account to that pumping.

26. The Kautzmann well is approximately 3000 feet horizontally, from the Applicant's proposed pumping site.

27. The Kautzmann well was drilled in 1974, and due to a significant decrease in its production, was deepened in 1980. It currently produces approximately 7 gpm for domestic use, year-around.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantaive and procedural requirements of law or rule

have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. Objector Loren Rech, having failed to appear at the hearing, is in default pursuant to Administrative Rule of Montana § 1.3.214(i).

4. Objector Orley Arthur, Jr., D.V.M., having failed to appear at the hearing, is in default pursuant to Administrative Rule of Montana § 1.3.214(i).

5. The Department must issue a permit if the Applicant proves by substantial credible evidence that the following criteria are met.

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate, and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial one;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

6. The use proposed by the Applicant is a beneficial use of water.

7. The amount proposed for appropriation is a reasonable one, and will not result in the waste of the water resource.

8. The proposed means of diversion, construction, and operation of the appropriation works are adequate.

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

10. Currently, there are unappropriated waters in the source of supply; at times when the water can be put to the use proposed by the Applicant in the amount the Applicant seeks to appropriate and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

11. The source of supply for Applicant's project is more likely than not, hydrologically connected to the surface water in the area, i.e., the Mussellshell River, and, therefore, is not groundwater within the meaning of the Water Use Act. MCA § 85-2-102(8), § 85-2-501(3), In the Matter of the Application for Beneficial Water Use Permit No. 14,965-g41E and Application for Change of Appropriation Water Right No. 19,230-c41E by Thomas H. Boone, Trustee. Final Decision May 21, 1981.

12. All of the objectors have prior rights to make reasonable use of their wells. State ex rel. Crowley v. District Court., 108 Mont. 89, 88 P.2d 23 (1939).

13. The Objectors are protected to the extent that their means of diversions are reasonable and adequate taking into account the customary means of uses in the area. - Crowley, supra.

14. The Objectors, however, are not, by their prior water rights, empowered to prevent all changes in occurrence in the water in the area. "Priority of appropriation does not include the right to prevent changes by later appropriators in the

condition of water occurrence, such as by increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions". MCA § 85-2-401(1) (1983).

15. The Objectors uses historically include year around use.

16. The Applicant has a present bona fide intent to appropriate water.

17. The water rights of a prior appropriator will not be adversely affected by Applicant's appropriation.

Wherefore, based upon these Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations below, Application No. 33484-g40A is hereby granted to Merle E. Hunt to appropriate up to 300 gallons per minute up to 131.5 acre-feet per year between May 1 and September 30 of each year, for sprinkler irrigation of approximately 35 acres in the NE¼ Section 22, Township 8 North, Range 25 East, Musselshell County, Montana. The appropriation is to be by means of a well located in NE¼SW¼NW¼ Section 23, Township 8 North, Range 25 East, Musselshell County, Montana. The source of supply is subsurface water stored in the abandoned underground mine workings of the Roundup Coal Mine Number 3, Room 5. The priority date for this permit shall be March 19, 1981 at 12:00 p.m.(noon).

This permit is issued subject to the following express terms, conditions, restrictions and limitations, necessary to protect the rights of other appropriators.

A. This permit is subject to all prior existing water rights in the source of supply. Further: this permit is subject to any final determination of existing water rights, as provided by Montana Law.

B. The Permittee shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of that quantity reasonably required for the purposes provided for herein.

C. The Permittee shall proceed with reasonable diligence in the construction of their well and appropriative works, and in actually applying the waters provided for herein to beneficial use.

D. Permittee shall diligently adhere to the terms, conditions, restrictions, and limitations of this Order.

E. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

F. If at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in

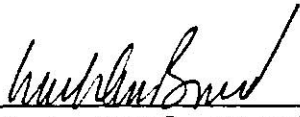
the matter allowing the applicant to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

G. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

NOTICE

This proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this proposal. Such exceptions must be filed (received) with the Hearing Examiner at 32 South Ewing, Helena, Montana 59620 within 20 days after service of this Proposal by first class mail, MCA § 2-4-623. All parties are urged carefully to review the terms of the proposed permit, especially checking the legal land descriptions, for correctness. No final decision shall be made until after the expiration of the period for filing exceptions, and the due consideration of those exceptions. All exceptions shall specifically set forth the precise portions of the proposed decision to which exception is taken, the reasons for the exception and authorities upon which the exception relies.

DONE this 19th day of March, 1984.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

MEMORANDUM

The parties to this hearing were rightfully concerned with the Applicant's possible depletive effects on their water uses. The Applicant however, demonstrated by substantial credible evidence that there is unappropriated water in the source of supply - Room 5 of the Roundup coal Mine #3. The main issue is that whether the natural recharge to the mine is sufficient annually to replace the water Applicant will pump out. If not, then it is possible that the pumping will create sufficient hydrologic gradient to reduce the efficacy of Objectors' wells. The primary hydrologic evidence available, however, indicates that the likelihood of adverse affect on the Objectors' wells is minimal even if the recharge rate of the mine is so slow that Applicant's pumping will induce increased flow from the surrounding alluvium. As to the effects on the flow of the Musselshell River, the Hearing Examiner notes that the information adduced at the hearing indicates the effects of

Applicant's pumping on the Musselshell are expected to be not only minimal, but impossible to trace and quantify (testimony of Paul Lemire and Sterling Sundheim).

Were the situation reversed, i.e., that the effects were surely significant, but impossible to trace and quantify, then the permit could not be issued. The Musselshell being already determined to be, at least for the purposes of this hearing, substantially appropriated, depletion thereto would be clearly adverse to its many users. Quigley v. McIntosh, 110 Mont. 495, 103 P.2d. 1067 (1940).

Perhaps the best evidence of the recharge rate of the mine is the evidence of the pumping needed to keep the mine dry during the mine's operation. While the volume and timing of that pumping were not clearly shown, the fact that substantial quantities of water were pumped from the mine is shown by Dept. Ex. 1, testimony of John McDermott, and uncontradicted by the parties at the hearing.

Because the Applicant showed that statutory criteria exist, the permit must issue. The mere possibility that some affect will result to Objectors' water pressure is insufficient to constitute

adverse effect. Not every effect upon a senior appropriator is adverse. Mathers v. Texaco, 77 N.M. 239, 421 P.2d. 771 (1966) Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 32 S.C. 470.

If the prior appropriators can reasonably exercise their water right, mere affects thereon are not adverse. MCA § 85-2-401(1) (1983). The Hearing Examiner notes that Mr. Kautzmann's well has already had to be deepened, but his previous problems with the adequacy of his well do not necessarily reflect a lack of water

available in the source for Applicant's appropriations. Mr. Kautzmann was the only Objector alleging the decline in the aquifer; the explanation of need for deepening his well is as likely to be that the well was simply inefficient as it is likely to be that the aquifer is lowering. Assuming arguendo, that the aquifer is declining, that in itself is not reason to deny a permit especially here, where the best evidence indicated that Mr. Kautzmann & the Applicant will be drawing from different strata of the syncline. See generally Mathers v. Texaco, supra.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 30, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Merle E. Hunt, Application No. 33484-g40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Merle E. Hunt, Box 5027, Roundup, MT 59072
2. Loren P. Peck, Box 206, Roundup, MT 59072
3. Arthur Orley, Jr., D.V.M., P.O. Box 67, Roundup, MT 59072
4. Steve and Catherine Racki, Klein Star Rt., Box 5005, Roundup, MT 59072
5. Darryld and Trixie Kautzmann, P.O. Box 883, Roundup, MT 59072
6. Frances Bajt, P.O. Box 573, Roundup, MT 59072
7. Sam Rodriguez,, Lewistown Field Office (inter-departmental mail)
8. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 20th day of March, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Loh
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-7-85

CASE # 33484